IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs September 17, 2008

# STATE OF TENNESSEE v. CAROLYN RHODES

**Appeal from the Criminal Court for Davidson County**
**No. 2003-A-494 Seth Norman, Judge**

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**No. M2007-02083-CCA-R3-CD - Filed February 12, 2009**

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A Davidson County Criminal Court jury convicted the defendant, Carolyn Rhodes, of four counts of rape of a child, one count of attempted rape of a child, and five counts of aggravated sexual battery. The trial court imposed an effective sentence of 28 years' imprisonment. In this appeal, the defendant contends that the trial court erred in the admission of certain evidence, should not have excluded an expert witness from the courtroom, should have permitted a psychiatric evaluation of the victim by a defense expert, and should have compelled the State to produce a copy of a video-taped interview of the victim. Discerning no reversible error, we affirm the judgments of the trial court. The case must be remanded, however, for the entry of a corrected judgment for Count 3.

**Tenn. R. App. P. 3; Judgments of the Criminal Court Affirmed; Remanded**

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and J.C. MCLIN, JJ., joined.

Tammy Wendt Mahew, Nashville, Tennessee, for the appellant, Carolyn Rhodes.

Robert E. Cooper, Jr., Attorney General and Reporter; Elizabeth B. Marney, Assistant Attorney General; Victor S. Johnson III, District Attorney General; and Brian Holmgren, Assistant District Attorney General, for the appellee, State of Tennessee.

## OPINION

The convictions are the result of the sexual abuse the victim, D.R., suffered at the hands of the defendant, his mother. D.R., who at the time of the 2006 trial was 14 years old, testified that before entering the fourth grade, he had resided in at least four different locations.[1] D.R. described "staying with" the defendant and a married couple in an apartment in the John Henry Hale housing project when he was in the second grade and later living with the defendant, two other women, and three other children in an apartment in the James Cayce housing project. D.R. stated

[1] As is the policy of this court, we refer to the minor victim by his initials.

that even when he lived with the defendant in the apartments, he spent the weekends with his "granddaddy and grandmama." According to D.R., Clarence Garrett, whom he called "granddaddy," and Dorothy Battle, whom he called "grandmama," were not his biological grandparents but had acted as his grandparents his entire life. D.R. stated that he lived exclusively with Mr. Garrett and Ms. Battle for two years at their Tucker Road residence while the defendant lived at another location. He testified that over a six-year period, the defendant came and went from the Tucker Road residence and that, when she was there, "she slept with [him] in [his] room."

D.R. testified that in September of 2002, he approached a school counselor about "[v]erbal abuse, sexual abuse and physical abuse" by the defendant. D.R. stated that he had previously told Mr. Garret about the defendant's physical abuse but had not told anyone about being sexually abused by the defendant. D.R. recalled that the defendant began sexually abusing him when he was six years old and they lived at the Tucker Road residence. D.R. testified that the abuse began with the defendant's "kissing [him] with her tongue and stuff" and then escalated to "fondling and touching" his "private parts and stuff." He stated that the defendant would "[s]queeze and pull on" his penis and force him to "squeeze" her breasts both over and under her slip. The defendant also asked D.R. to "rub up against" her "leg or butt" with his "private parts" while they were clothed.

D.R. also described an incident where the defendant ordered him to "get on top of her" and forced him to move up and down "rodeo[-]style." D.R. remembered that the defendant once forced him to place his penis in her vagina but stated that he did not have an erection at the time because he "was too young." On a separate occasion, the defendant directed D.R. to "lick" her vagina, which he described as "sour" and "nasty" due to the defendant's resistance to daily bathing. On another occasion, the defendant touched and licked D.R.'s penis through a "hole" in his "tighty whities." D.R. testified that all of the abuse occurred in the bedroom he shared with the defendant in the Tucker Road residence.

Janice Dozier, school social worker for Metropolitan Nashville Public Schools, testified that D.R. was initially referred to her in September 2002 for "constant headaches." During the time she was counseling D.R., she became aware of an investigation by the Department of Children's Services ("DCS") into allegations that D.R. was being abused. When Ms. Dozier asked D.R. about the allegations, he told her that his mother had been sexually abusing him. Ms. Dozier stated that she did not participate in the investigation but focused on "trying to help [D.R.] deal with some of the academic struggles and the emotional struggles that he was dealing with."

DCS caseworker Helen Sharp, who was assigned to D.R's case in 2002, testified that at the beginning of the investigation, D.R. was in the custody of Ms. Battle, who was his aunt, and Mr. Garrett, who was her boyfriend. Ms. Sharp stated that D.R. initially told her that the defendant had fondled his penis. Based upon that information, Ms. Sharp contacted law enforcement and scheduled a forensic interview with the Child Advocacy Center. Pamela Scretchen performed the interview, which took place in February 2003. Ms. Sharp testified that she was unable to locate the defendant in order to interview her in relation to the investigation.

Mr. Garrett testified that he had "raised" D.R. "since he was a baby" and that from the time D.R. was two years old he had called Mr. Garrett "granddaddy." Mr. Garrett stated that in 2002, D.R. lived with him and Ms. Battle at the Tucker Road residence. He explained that although he and Ms. Battle were not legally married, they had cohabited for 28 years at the time of her death in 2004. Mr. Garrett recalled that D.R. confided in him that the defendant had been sexually abusing him, but he denied reporting the abuse to either DCS or D.R.'s school.

During cross-examination, Mr. Garrett denied ever seeing the defendant strike D.R. or seeing the two engaged in sexual activity. He also stated that D.R. never appeared to be afraid of the defendant, who, Mr. Garrett claimed, took excellent care of D.R.

Former Metropolitan Police Detective Brett Gipson testified that in 2002, he was assigned to investigate D.R.'s allegations against the defendant. Detective Gipson stated that although he was initially unable to locate the defendant, on January 8, 2003, the defendant "appeared at [his] office, unscheduled, unannounced, . . . .[a]nd [they] sat down for an interview." A copy of the video-taped interview was played for the jury. During the interview, the defendant admitted having sexual contact with D.R.

Gloria Frame testified on behalf of the defendant that she had known the defendant for more than 20 years and that she had never seen the defendant strike D.R. Ms. Frame testified that shortly before D.R. made his allegations of sexual abuse, Mr. Garrett told Ms. Frame that he intended to obtain custody of D.R. by "going to the school and tell[ing] them that she's messing with him down there." Ms. Frame stated that she told Mr. Garrett to "shut [his] mouth" because D.R. was present during the conversation. Ms. Frame insisted that she had never seen D.R. behave as though he was scared of the defendant. Ms. Frame admitted during cross-examination that she had not reported her conversation with Mr. Garrett following the defendant's arrest. She stated only that she had told "a family member" about the conversation.

Jackie Nelson testified that she had known the defendant for approximately 15 years and, during that time, had come to view the defendant as "an aunt . . . because she . . . help[ed] raise" Ms. Nelson. Ms. Nelson testified that the defendant and D.R. had "a good mother-son relationship" and that D.R. "didn't have no hatred towards [the defendant] at all." Ms. Nelson recalled that the defendant had spanked D.R. with a belt and with her hand as a form of discipline. She testified that D.R. never behaved as though he was scared of the defendant.

During cross-examination, Ms. Nelson admitted that the defendant used illegal drugs but denied ever seeing the defendant use drugs in the presence of D.R. Ms. Nelson also conceded that, because of his difficulties in learning and processing information, it would be impossible for D.R. to retell a story.

Donna Clemmons, a private investigator and former social worker, testified that she was assigned to provide educational assistance to D.R. after the defendant's arrest and D.R.'s placement in the home with Mr. Garrett and Ms. Battle. Ms. Clemmons recalled that neither Mr.

Garrett, because he could not read, nor Ms. Battle, because she was too ill, helped D.R. with his homework. Ms. Clemmons stated that D.R. was developmentally behind other children his age and "overwhelmed" by his class work. She testified that he read on a first or second grade level despite being in the fourth grade. Ms. Clemmons stated that other children picked on D.R. because he wore Mr. Garrett's clothing and shoes to school and because he refused to bathe. Ms. Clemmons testified that during her time in the home with D.R., she noticed that D.R. feared Mr. Garrett and did whatever Mr. Garrett told him to do. On cross-examination, Ms. Clemmons admitted that D.R.'s educational difficulties would most likely have prevented him from memorizing a detailed story.

At the conclusion of the proof, the jury returned verdicts of guilty of rape of a child as charged in Counts 1, 4, 5, and 6, attempted rape of a child in Count 2, and aggravated sexual battery in Counts 3, 7, 8, 9, and 10. After a sentencing hearing, the trial court imposed an effective sentence of 28 years' incarceration.

Following the denial of her timely motion for new trial, the defendant perfected a timely appeal to this court.

*I. Confrontation Clause*

The defendant complains that the trial court erred by permitting Ms. Dozier and Ms. Sharp to testify about statements D.R. made to them "regarding specific acts of sexual contact, fondling, sexual intercourse, and oral sex." She claims that these hearsay statements were testimonial in nature and, as such, their introduction ran afoul of the ruling in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004). The State submits that Ms. Sharp did not present hearsay testimony. In the alternative, the State contends that because the defendant had ample opportunity to cross-examine D.R., she cannot complain of a *Crawford* error.[2]

Because the defendant claims a violation of her right to confront witnesses, our review of the trial court's ruling is de novo. *State v. Lewis*, 235 S.W.3d 136, 141-42 (Tenn. 2007).

Both the state and federal constitutions supply the criminal accused with the right to confront the witnesses against her. Although the provisions are not entirely coterminous, *see id.* at 144 (quoting *State v. Maclin*, 183 S.W.3d 335, 342 (Tenn. 2006)), our supreme court has concluded that "there is no reason to interpret" the State and federal guarantees differently when considering confrontation clause claims, *see id.* Our high court has generally held that the confrontation clause affords "'two types of protection for criminal defendants: the right to physically face the witnesses who testify against the defendant, and the right to cross-examine witnesses.'" *Lewis*, 235 S.W.3d at 142 (quoting *State v. Williams*, 913 S.W.2d 462, 465 (Tenn. 1996)). To serve each of these goals, the United States Supreme Court, in *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531 (1980), established guidelines for the admissibility of the out-of-court statement of an unavailable declarant.

[2] Although the State does not directly address Ms. Dozier's testimony, we presume it intended its argument to address the testimony of both women.

"[U]nder *Roberts*, an out-of-court statement by an unavailable witness is admissible if it (1) falls within a firmly rooted exception to the hearsay rule or (2) contains such particularized guarantees of trustworthiness that adversarial testing of the statement through cross-examination would add little to the assessment of whether the evidence is reliable." *Maclin*, 183 S.W.3d at 344.

In *Crawford*, the Court departed from its earlier ruling and held for the first time that "[w]here testimonial evidence is at issue . . . the Sixth Amendment demands . . . unavailability and a prior opportunity for cross-examination." *Crawford*, 541 U.S. at 68, 124 S. Ct. at 1374 (2004). "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law--as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." *Id.* Thus, *Crawford* "bars the admission of testimonial hearsay absent a showing of unavailability and a prior opportunity for cross-examination." *Lewis*, 235 S.W.3d at 146.

Initially, we point out that although the defendant claims in her brief that both Ms. Dozier and Ms. Sharp presented in their testimony statements made by D.R. describing various sexual activity with the defendant, neither witness recounted any statement given by D.R. that detailed sexual activity. Ms. Dozier, when asked whether the victim's allegations involved sexual abuse, answered simply, "Yes." Then, when asked if D.R. had revealed "the person who was responsible for that sexual abuse," she answered, "His mother." Ms. Sharp testified that, during her initial interview with D.R., he "provided some information that involved fondling of his penis area." When asked whether D.R. had indicated who "had fondled him in that area," Ms. Sharp responded, "His mother, Carolyn Rhodes."

Although the statements were accusatory, neither statement presented any confrontation clause problem under the circumstances of this case. In this instance, the declarant, D.R., testified at trial and was subjected to lengthy cross-examination by defense counsel. Because the defendant had the opportunity to confront D.R., her right to confront the witnesses against her was not violated by either Ms. Dozier's or Ms. Sharp's testimony.

Additionally, although the defendant correctly points out that the statements are hearsay, *see* Tenn. R. Evid. 801, and do not fall within any recognized hearsay exception, their erroneous admission was harmless because the statements were cumulative to the testimony provided by D.R. D.R. testified at length about the sexual abuse he suffered, and he never wavered in his assertion that the defendant perpetrated the abuse. Defense counsel throughly cross-examined D.R. regarding the statements he gave to both Ms. Dozier and Ms. Sharp. Under these circumstances, the admission of hearsay testimony was harmless error. *See* Tenn. R. Crim. P. 52(a).

*II. Exclusion of Defense Expert Pursuant to Rule 615*

The defendant complains that the trial court erred by excluding her "expert witness" from the courtroom because, she contends, the presence of this witness was essential to the

presentation of her proof. The State contends that the trial court did not err by ordering the witness to leave.

Rule 615 of the Tennessee Rules of Evidence provides, in pertinent part, that "[a]t the request of a party the court shall order witnesses, including rebuttal witnesses, excluded at trial or other adjudicatory hearing. . . . This rule does not authorize exclusion of . . . a person whose presence is shown by a party to be essential to the presentation of the party's cause." Tenn. R. Evid. 615. Our supreme court has recognized that the purpose of the rule "is to prevent a witness from changing or altering his or her testimony based on testimony heard or facts learned from other testifying witnesses," *State v. Bane*, 57 S.W.3d 411, 423 (Tenn. 2001) (citing *State v. Harris*, 839 S.W.2d 54, 68 (Tenn. 1992)), and has held that "allowing an expert witness to remain in the courtroom as an 'essential person' generally does not create the risk that the expert will alter or change factual testimony based on what is heard in the courtroom," *Bane*, 57 S.W.3d at 423.

In this case, just before proceedings commenced on the second day of trial, the following colloquy occurred:

> [Prosecutor]: Dr. Kenner, who is listed as a witness is in court and the rule is in effect.
>
> [Defense Counsel]: Your Honor, he is a material, he is a material individual to my presentation of my client's case, so I think that he would be allowed in the courtroom at the time.
>
> The Court: No, he would not either. The rule has been called for and the rule will be applied.
>
> [Defense Counsel]: I understand, Your Honor. But it's my understanding if there is an individual who is material to the presentation of the [d]efendant's case they are allowed to remain in the courtroom.
>
> The Court: Witness will be excluded from the courtroom until they are called to testify.
>
> [Defense Counsel]: Your Honor, he is an expert witness and there is a possibility he may not testify and at this point in time if the [c]ourt is going to exclude him, then we'll just go ahead and waive any testimony he might have to leave him in the courtroom.

The Court: Witness will be excluded from the courtroom, just as I have ruled.

Because the defendant failed to make an offer of proof regarding the purpose of Dr. Kenner's presence in the courtroom, it is impossible for this court to determine whether the trial court erred by ordering that he could not remain in the courtroom as an essential witness. Of course, once defense counsel agreed to forfeit any potential testimony from Dr. Kenner, the trial court should not have ordered that he be excluded from the courtroom. The defendant has failed to establish prejudice as a result of Dr. Kenner's exclusion, however, and we discern none, rendering the error harmless.

### *III. Right to Present a Defense*

The defendant contends that various pretrial rulings by the trial court infringed upon her right to present a defense. She complains that the trial court should have compelled the State "to produce the child-victim for the purpose of a psychiatric evaluation" and should have ruled on her motion "for an order permitting access to records maintained by state agencies." She also complains that the trial court erred by ruling that she would be "limited in introducing testimony through her expert witness of her mental condition." Finally, she asserts that the trial court erred by denying her motion "to [c]ompel the State to provide a copy of the forensic interview tape." The State, of course, contends that "[t]hese issues are without merit."

#### *A. Psychiatric Evaluation of the Victim*

Although the defendant contends that the trial court "refused to consider possible factors triggering the need for a mental evaluation of the victim," she does not articulate those "possible triggering factors." In addition, although she has cited case law for the proposition that a trial court *may* order a mental evaluation of the victim of a sex crime, she has cited no evidence that the trial court *should* have done so in this case. The defendant correctly observes that a trial court may order the victim of a sexual offense to undergo a mental evaluation under "'the most compelling of reasons, all of which must be documented in the record,'" *State v. Barone*, 852 S.W.2d 216, 221 (Tenn. 1993) (quoting *Forbes v. State*, 559 S.W.2d 318, 321 (Tenn. 1977)), but she presented no reason for such an evaluation in this case, let alone any "compelling" reason.[3] The defendant simply offered no proof either before or during the trial to call into question the victim's mental health. Given the lack of proof and the nebulous nature of the defendant's claims, we will not disturb the ruling of the trial court.

[3] The defendant apparently presented the testimony of a Dr. Kenner at a pretrial hearing on the issue, but the transcript of that hearing is not a part of the record on appeal.

*B. Records Maintained by State Agencies*

The defendant also contends that the trial court erred by failing to rule on her pretrial request for access to records "maintained by state agencies." The record establishes that the trial court took the defendant's "Motion for Psychiatric Evaluation of Child Victim and for Order Permitting Defense Counsel Access to Records Maintained by State Agencies and Other Entities as Agents Thereof" under advisement on May 1, 2006. On May 18, 2006, the trial court entered an order denying the defendant's requests for a psychiatric evaluation and/or access to the victim for an interview. The court neglected to rule on the defendant's request for access to "records maintained by state agencies." The record contains no evidence that the defendant ever mentioned the request again following the May 1, 2006 hearing. Given the defendant's complacency in allowing the trial to proceed without a ruling on the motion, she is not entitled to relief. *See* Tenn. R. App. P. 36(a) ("Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error.").

Moreover, the defendant does not identify any specific record maintained by any particular agency to which she believes she is entitled. Although she makes a bare assertion that "said documents contain exculpatory evidence and should be produced in order for the [d]efendant to prepare for her defense." She has yet to reveal the identity of "said documents," their location within any state agency, or the nature of the alleged "exculpatory evidence." As a result, she would not be entitled to relief even if she had not waived her claim.

*C. Restriction on Expert Testimony of Defendant's Mental Condition*

The defendant complains that the trial court erred by ordering that any expert testimony about the defendant's mental condition would be limited to the fact that she was mentally retarded. She claims that "if additional evidence were [sic] admitted regarding circumstances of mental retardation, a material issue of fact is raised as to whether a mentally retarded person would be able to act either intentionally, knowingly, or recklessly."

Again, our review of the defendant's claim is hampered by her failure to build an appropriate record. Although the defendant filed a pretrial notice that she intended to present expert testimony about the defendant's mental condition and although a hearing was apparently conducted on this issue during which testimony was presented, the transcript of that hearing is not a part of the record on appeal. Additionally, the defendant did not present any evidence of the defendant's mental condition at trial and made no proffer of what the excluded testimony might entail. Accordingly, it is impossible for this court to ascertain what, if any, impact the defendant's "additional evidence" might have had on the trial. *See* Tenn. R. Crim. P. 36(a). The defendant does not even specify the content or character of this "additional evidence" in her appellate brief. In consequence, we are constrained to conclude that, despite any potential error in the trial court's restriction on the expert proof, the defendant has failed to establish any prejudice as a result of the ruling.

*D. Videotape of Forensic Interview*

Last in the lineup of rulings the defendant claims hampered her right to present a defense is her assertion that the trial court erred by failing to compel the State "to provide a copy of the forensic interview tape." She contends that the district attorney general's office "policy" of refusing requests to copy forensic interview videotapes contravenes the rules of discovery.

The record establishes that after the State refused to provide the defendant with a copy of D.R.'s video-taped interview at the Child Advocacy Center or to allow defense counsel to copy the videotape, the defendant filed a motion to compel the provision of a copy of the videotape. In its response, the State noted that its "open[-]file policy" allowed defense counsel to view the videotape at her convenience in the district attorney general's office, which was located in the same building as defense counsel's office, and insisted that the defense would not be harmed by the State's refusal to allow the tape to be copied. The trial court agreed. At trial, defense counsel again requested a copy of the videotape for review following the State's direct examination of D.R. The State again refused, but the prosecutor offered to arrive early the next morning to allow defense counsel an opportunity to review the hour-long recording. On the following morning, the prosecutor noted for the record that he had arrived early as promised but defense counsel had not taken the opportunity to review the tape. Defense counsel stated simply that she "had reconsidered [her] position on reviewing the tape this morning."

Citing Rule 16 of the Tennessee Rules of Criminal Procedure, the defendant contends that she was entitled to a copy of the videotape because it was "material to preparing the defense" and because the State "use[d] the item in it's case in chief at trial." Rule 16 provides, among other things, that upon the request of the defendant,

> the [S]tate shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings, or places, or copies or portions thereof, if the item is within the [S]tate's possession, custody, or control and:
>
> (i) the item is material to preparing the defense;
>
> (ii) the government intends to use the item in its case-in-chief at trial; or
>
> (iii) the item was obtained from or belongs to the defendant.

Tenn. R. Crim. P. 16(a)(1)(F). This language is straightforward, and the State's duty to allow both inspection and copying is mandatory. In consequence, the State's "policy" prohibiting the copying of the forensic interview tape runs afoul of Rule 16, and the trial court incorrectly ruled that the State had complied with the discovery rules by merely allowing the defendant to inspect the tape.

Although there is no justification for the State's "policy," we cannot fathom how the defendant was prejudiced by the policy in this case. *See State v. Schiefelbein*, 230 S.W.3d 88, 113 (Tenn. Crim. App. 2007) ("Although the 'potential' for prejudice from such restrictions is readily evident, reversible error requires more palpable harm."). The videotape was available for review by defense counsel for nearly three years prior to the defendant's trial. Further, the prosecutor made special arrangements to allow defense counsel to review the videotape on the morning before cross-examining D.R. exactly as she had requested. Counsel, however, failed to avail herself of that opportunity. As we have previously indicated, a party who fails to take reasonably available steps to mitigate the harmful effect of an error is not entitled to use the error to obtain relief on appeal. *See* Tenn. R. App. P. 36(a).

### *IV. Corrected Judgment Form*

Although the minute entry containing the jury's verdict indicates that the defendant was convicted of aggravated sexual battery in Count 3 of the indictment, the judgment form for this count lists a conviction offense of attempted rape of a child. Accordingly, the case must be remanded for the entry of a corrected judgment form listing the correct conviction offense. Because both aggravated sexual battery and attempted child rape are both class B felonies governed by standard release eligibility rules, no other changes are necessary.

### *V. Conclusion*

Because there is no reversible error in the judgments of the trial court, they are affirmed. The case is remanded for the entry of a corrected judgment form in Count 3.

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JAMES CURWOOD WITT, JR., JUDGE